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NUISANCE AND TRESPASS CLAIMS IN ENVIRONMENTAL LITIGATION: LEGISLATIVE INACTION AND COMMON LAW CONFUSION

G. Nelson Smith, III*

I. INTRODUCTION

Over the past twenty-five years, very few areas of law have grown as quickly as environmental law. Unfortunately, along with this growth has come a complex legal scheme and a tremendous amount of confusion caused by legal statutory interpretation and political wrangling.¹ The net effect of this confusing, complicated web of environmental laws has been an increase in due diligence before the purchase of property.² Another effect is that, in many cases, environmental laws have served as the basis for destroying potential acquisitions.³ Many people have complained that the current statu-

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1. G. Nelson Smith, III, *Trashing the Town and Making It Pay: The Problem With The Municipal Liability Scheme Under CERCLA*, 26 CONN. L. REV. 585 (1994). One of the best examples of how political influence has created an interpretive nightmare is outlined in CERCLA Section 119. 42 U.S.C. § 9619 (1980) (amended 1992). Under that statute, contractors who are negligent when cleaning up an environmental site for the government are statutorily held harmless from liability. However, under the same statute, if the contractor is sued under a strict liability theory, then the contractor can still be held liable. The result is that under CERCLA Section 119, a contractor can be held liable if he complies with the law under strict liability, but if he admits to negligence then he will be held harmless by the government. Such an absurd result is indicative of how many of the environmental statutes currently operate.

2. See G. Nelson Smith, III, *A Comparative Analysis of European and American Environmental Laws: Their Effects on International Blue Chip Corporate Mergers and Acquisitions*, 14 HASTINGS INT'L & COMP. L. REV. 573 (1991).

3. *Id.* at 597-600. There, it was noted that:

[t]wo of the best known blue chip mergers and acquisitions that were destroyed as a result of potential hazardous waste liabilities were the 660 million dollar proposed acquisition by the Sterling Group of Koppers Chemical Company and the proposed 300 million dollar acquisition of Grow Group Inc. by PPG Industries.

Id. at 597.

tory scheme is unfair because it punishes law-abiding citizens who violated no laws when they created the contamination.⁴ Some of these individuals further argue that the laws failed to adequately inform them of the wrongdoing before 1980, and that Congress should modify such laws to protect behavior that occurred before that date.⁵

Ironically, while the statutes themselves are relatively new, they are based in the common law remedies of nuisance and trespass. Since the early seventeenth century, courts have recognized nuisance and trespass theories in environmental matters.⁶ Nuisance and trespass claims in environmental contamination cases are still used today, with many such cases involving petroleum contamination. However, unlike the environmental statutes of today that specifically inform the public of the liabilities resulting from environmental contamination, the nuisance and trespass remedies remain both nebulous and confusing. Moreover, nuisance and trespass allegations are inconsistently interpreted by courts, making the "failed to adequately inform" argument even stronger than it would be with environmental statutes that seek to retroactively punish polluters.

The purpose of this article is to show how the use of nuisance and trespass allegations in environmental cases has failed to provide legal direction for potentially responsible parties. This has created contradictions and absurd results. Furthermore, this article seeks to establish that there is a

4. See *United States v. Monsanto Co.*, 858 F.2d 160, 174-75 (4th Cir. 1980), *cert. denied*, 490 U.S. 1106 (1989); *United States v. Northeastern Pharmaceutical*, 810 F.2d 726, 732-34 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Shell Oil Co.*, 841 F. Supp. 962, 974 (C.D. Cal. 1993); *United States v. Atlas Minerals and Chemicals, Inc.*, 797 F. Supp. 411, 419 (E.D. Pa. 1992); *United States v. Kramer*, 757 F. Supp. 397 (D.N.J. 1991); *United States v. Dickerson*, 640 F. Supp. 448, 451 (D. Md. 1986).

5. Currently, Congress is considering a bill that would protect people from liability that occurred before 1980, because they agree that people were not adequately informed of the environmental dangers associated with their conduct. This charge, primarily led by insurance carriers, is under the proposed amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Moreover, many defense contractors have urged the government to absolve them from environmental liability that occurred before 1980, and have sought from the Defense Acquisition Regulation (DAR) Council, environmental cost principles that would make contractors immune from liability if the contractors complied with existing laws when the site was operated. See G. Nelson Smith, III, *When Should Government Contractors Be Indemnified?*, 1 FED. FACILITIES ENVTL. J. 439 (1990).

6. See *infra* notes 14-23.

need to statutorily define when a cause of action arises under a nuisance or trespass claim in order to eliminate the potential for inconsistencies.

II. THE HISTORY OF THE CONFUSION IN ENVIRONMENTAL NUISANCE AND TRESPASS CLAIMS

The legal theories of nuisance and trespass were developed long before the birth of this country. In the latter part of the twelfth century, King Henry II began several reforms that greatly changed the course of English law.⁷ During his reign, King Henry II unified and centralized English law by establishing a permanent court of professional judges which held court in various places throughout the country. The King also initiated the use of "inquests" or "recognitions" and the original writ as regular parts of the institution of justice.⁸ However, in order to bring an action under nuisance, the King required the person bringing the suit to first obtain his approval or the approval of the Justices.⁹

A. Nuisance

By the beginning of the sixteenth century, it was recognized that a nuisance might be a public offense and therefore remediable by indictment. Alternatively, the nuisance could be private and remediable by a suit brought by the injured party.¹⁰ Courts of equity used nuisance law to resolve con-

7. William A. McRae, Jr., *The Development of Nuisance In the Early Common Law*, 1 U. FLA. L. REV. 27 (1948).

8. *Id.* at 28 (citing WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 327 (5th ed. 1931); 1 FREDERICK POLLACK AND FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 138 (2d ed. 1911)).

9. McRae, Jr., *supra* note 7, at 28. Specifically, the author noted: In the land law the encroachments of the king's court were rapid. Since the violation of a man's seisin became the only forum for determining "who was last seised of this free tenement?" In the procedure by original writ (that is, by royal writ) and inquest of the neighbors, no question of right was determined; this was at first left to the lord's court. But the transition to the grand assize, which determined the question of right, *maius jus*, was inevitable, and it happened indeed sometime during Henry's reign. It became axiomatic that "when a person claims any freehold tenement, or a service . . . he cannot draw the person holding it into a suit without the King's writ, or that of his Justices."

Id.

10. *Id.* at 36 (citing 8 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 424 (5th ed. 1931) (footnotes omitted)).

flicts between property owners and strike a balance between the competing interests of property owners in order to allow the reasonable enjoyment of one's property.¹¹ Many people viewed these so called private nuisance actions as an early method of town planning because towns sought to regulate and control the arrival of new industries and occupations.¹² Thus, during that period, many people also considered nuisance claims valuable because they created flexible remedies and allowed the courts of equity to resolve disputes.¹³

One of the earliest records of the use of nuisance in an environmental matter is found in *William Aldred's Case*.¹⁴ There, the court noted that "an action on the case lies for erecting a hogstye so near the house of the plaintiff that the air thereof was corrupted."¹⁵ The judge rejected the defendant's argument "that the building of the house for the hogs was necessary for the sustenance of man: and one ought not to have so delicate a nose, that he cannot bear the smell of

11. *Beatty v. Washington Metro. Area Transit Auth.*, 860 F.2d 1117, 1124 (D.C. Cir. 1988).

12. *Id.* (citing E. RE, REMEDIES 431 (2d ed. 1987)).

13. *Id.* The *Beatty* court provided examples of how the courts of equity resolved such cases:

For example, in *Sturges v. Bridgeman*, 11 Ch. D. 852 (1878), the utility of a physician's consulting room was seriously affected by the vibration caused by the neighboring confectioner's business that used large pestles and mortars to pound "loaf sugar." Although both parties were entitled to the reasonable use and enjoyment of their property, the court held that the plaintiff was entitled to an injunction. It is important to note, however, that the court decreed, "I will give [the defendant] a reasonable time . . . to alter the position of his mortars."

Beatty, 860 F.2d at 1124 (citing *Sturges v. Bridgeman*, 11 Ch. D. 852, 859 (1878)). The court provided another example of a compromising equity court:

In *Hennessey v. Carmony*, 25 A. 374 (N.J. Ch. 1892), . . . [t]he plaintiff sought to enjoin the use of drying machines which "whiz and revolve rapidly" causing noise and vibrations to plaintiff's property. Faced with the task of balancing the conflicting interests of the parties, the court granted the decree, but provided "that the defendant be restrained from so using his machines as to cause [plaintiff's] house to vibrate"

Beatty, 860 F.2d at 1124 (citing *Hennessey v. Carmony*, 25 A. 374, 381 (N.J. Ch. 1892)).

14. 77 Eng. Rep. 816 (K.B. 1611).

15. *Id.*; see also Robert R. Lohrmann, Comment, *The Environmental Law-suit: Traditional Doctrines and Evolving Theories To Control Pollution*, 16 WAYNE L. REV. 1085 (1970).

hogs."¹⁶ In rejecting the argument, the reasoning was based, in large part, on an environmental analogy:

And the building of a lime-kiln is good and profitable; but if it be built so near a house, that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it. So if a man has a watercourse running in a ditch from the river to his house, for his necessary use; if a glover sets up a lime-pit for calve skins and sheep skins so near the said watercourse that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it¹⁷

B. *Trespass*

Like nuisance, the law of trespass also has a lengthy history. As will be discussed later in more detail,¹⁸ a trespass is a direct infringement upon another's right of possession¹⁹ and may be committed on or beneath the surface of the earth.²⁰ The arrival of trespass claims roughly coincided with the establishment of nuisance law. From the time of Henry III, it was sometimes used instead of nuisance.²¹ However, the use of trespass to resolve disputes declined. During the reign of King Henry IV, trespass was not allowed for an obstruction of a right of way.²² King Henry IV only allowed such actions to be pursued under nuisance.²³

Nevertheless, trespass theories continued to develop in England. Under the common law of England, where individual rights were preserved by the Magna Carta, a violation of those rights could be remedied by a traditional action for damages.²⁴ Violating the Magna Carta created an action in

16. *William Aldred's Case*, 77 Eng. Rep. at 817; Lohrmann, *supra* note 15, at 1106.

17. *William Aldred's Case*, 77 Eng. Rep. at 821.

18. See *infra* part III.C.

19. *Schwartzman, Inc. v. Atchison, T. & S.F. Ry. Co.*, 857 F. Supp. 838, 844 (D.N.M. 1994); *Pacheco v. Martinez*, 636 P.2d 308, 312 (N.M. Ct. App. 1981); RESTATEMENT (SECOND) OF TORTS § 158 (1977).

20. *Schwartzman*, 857 F. Supp. at 844; RESTATEMENT (SECOND) OF TORTS § 158 (1977).

21. *McRae, Jr.*, *supra* note 7, at 33-34.

22. *Id.* at 34.

23. *Id.*

24. *Widgeon v. Eastern Shore Hosp. Ctr.*, 479 A.2d 921, 924 (Md. 1984).

trespass.²⁵ One case that illustrates the importance of trespass claims was *Wilkes v. Wood*.²⁶ In *Wilkes*, the Secretary of State entered the plaintiff's home and seized papers upon an unlawful general arrest warrant. Lord Pratt acknowledged in his instructions to the jury that the official had trespassed by acting "contrary to the fundamental principles of the constitution."²⁷ The court then held that the jury could consider the illegal conduct in assessing damages.²⁸

In 1840, the theory of nuisance expanded in England where the courts began to apply nuisance in negligence cases, further blurring the criminal and tort concepts of the writ.²⁹ Finally, in 1866, in the case of *Rylands v. Fletcher*,³⁰ an English Court held that negligence was not required in nuisance actions and that a strict liability standard could be applied.³¹ It is this strict liability standard that makes environmental nuisance and trespass claims so attractive to plaintiffs today.

III. MODERN CONFUSION

A. *The Petroleum Exclusion Under CERCLA*

In the 1970's, Congress enacted several environmental statutes which diminished the use of common law nuisance and trespass. Acts such as the Clean Air Act,³² Clean Water Act,³³ Toxic Substances Control Act³⁴ and Resource Conser-

25. *Id.*

26. 98 Eng. Rep. 489 (1763), cited in *Widgeon*, 479 A.2d at 924.

27. *Widgeon*, 479 A.2d at 924 (quoting *Wilkes*, 98 Eng. Rep. at 507).

28. *Id.*

29. Kathleen Ann O'Neill, Note, *Chemical Nuisance: Application of Public Nuisance Theory as a Remedy for Environmental Law Violations*, 26 SUFFOLK U. L. REV. 51 (1992).

30. 1 L.R.-Ex. 265 (1866).

31. *Id.* at 279 (holding that negligence is not required in nuisance actions). In *Rylands*, the defendants constructed a reservoir. Upon filling the reservoir, water broke through one of the vertical shafts leading to the plaintiff's abandoned coal mine, thereby causing the plaintiff to cease operations. The court held the defendants strictly liable, despite the fact that the contractor who constructed the reservoir was negligent in his construction, reasoning:

We think that the true rule of law is, that the person who for his own purposes brings his on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequences of its escape.

Id. at 279.

32. 42 U.S.C. §§ 7401-7671 (1988 and Supp. 1993).

33. 33 U.S.C. §§ 1251-1387 (1988 and Supp. 1993).

34. 15 U.S.C. §§ 2601-2692 (1988 and Supp. 1993).

vation and Recovery Act (RCRA)³⁵ were all passed between the years 1970 and 1977. These acts reduced the number of claims involving common law air pollution,³⁶ common law water pollution³⁷ and common law hazardous waste claims, particularly those claims involving petroleum contamination.³⁸ In essence, these statutes eliminated many of the inconsistencies created by the courts by statutorily outlining when a lawsuit could be filed, who could be held liable, and setting a defined statute of limitations period.³⁹

In 1980, the stability that appeared to be created as a result of the passing of these statutes disappeared with the passing of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).⁴⁰ Broadly, CERCLA provides that the term hazardous substance "does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated a haz-

35. 42 U.S.C. §§ 6901-6992(k) (1988 and Supp. 1993).

36. See *Union Elec. Co. v. Environmental Protection Agency*, 515 F.2d 206 (8th Cir. 1975), *aff'd*, 427 U.S. 246 (1976); *Indiana & Mich. Elec. Co. v. Environmental Protection Agency*, 509 F.2d 839 (7th Cir. 1975); *Duquesne Light Co. v. Environmental Protection Agency*, 481 F.2d 1 (3rd Cir. 1973); *Movement Against Destruction v. Volpe*, 361 F. Supp. 1360 (D.C. Md.), *aff'd*, 500 F.2d 29 (4th Cir. 1973); *In re Sports Complex in Hackensack Meadowlands*, 300 A.2d 337 (N.J. 1973); *Commonwealth Dept. of Env'tl. Resources v. Pennsylvania Power Co.*, 337 A.2d 823 (Pa. 1975).

37. *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977); *Ford Motor Co. v. United States Env'tl Protection Agency*, 567 F.2d 661 (6th Cir. 1977); *Marathon Oil v. Environmental Protection Agency*, 564 F.2d 1253 (9th Cir. 1977); *Quarries Petroleum Co., Inc. v. United States*, 551 F.2d 1201 (Cl. Ct. 1977); *CPC Int'l. Inc. v. Train*, 540 F.2d 1329 (8th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *Peabody Coal Co. v. Train*, 518 F.2d 940 (6th Cir. 1975); *United States v. Republic Steel*, 491 F.2d 315 (6th Cir. 1974); *United States v. Detrex Chemical Industries Inc.*, 393 F. Supp. 735 (D.C. Ohio 1975); *United States ex rel Scott v. United States Steel Corp.*, 356 F. Supp. 556 (C.D. Ill. 1973); *United States v. Consolidation Coal Co.*, 354 F. Supp. 173 (D. W. Va. 1973); *United States Steel Corp. v. Illinois Pollution Control Bd.*, 367 N.E.2d 327 (Ill. App. Ct. 1977); *Society for the Protection of N.H. Forest v. Site Evaluation Comm.*, 337 A.2d 778 (N.H. 1975); *Mobil Oil Corp. v. Town of Huntington*, 339 N.Y.S.2d 139 (Sup. Ct. 1972); *State v. Republic Steel Corp.* 38 Ohio Misc. 43 (Muni. 1973).

38. Resource Conservation and Recovery Act cases include *U.S. Brewers Ass'n v. Environmental Protection Agency*, 600 F.2d 974 (D.C. Cir. 1979) and *City of Philadelphia v. State*, 376 A.2d 888 (N.J. 1977), *prob. juris. noted*, 434 U.S. 964 (1977); Toxic Substance Control Act cases include *School Dist. of City of Allentown v. Marshall*, 657 F.2d 16 (3rd Cir. 1981), and *SED, Inc. v. City of Dayton*, 519 F. Supp. 979 (C.D. Ohio 1981).

39. See *supra* notes 33-39.

40. 42 U.S.C. § 9601 (1988 and Supp. 1993).

ardous substance under subparagraphs (A) through (F) of this paragraph"⁴¹ There is virtually no contemporaneous legislative history that directly relates to the scope of CERCLA's petroleum exclusion.⁴² This lack of information surrounding CERCLA's enactment is because the final statute was a compromise among three competing bills.⁴³ Congress created further difficulty for litigants in petroleum contamination cases under CERCLA by failing to define the terms "petroleum" and "fraction."⁴⁴ It appears that such a lack of definition has helped persuade plaintiffs to sue under the theory of nuisance and trespass to avoid dismissals under CERCLA.⁴⁵

A plaintiff's inability to use CERCLA to litigate petroleum contamination cases has also had a profound effect at the state level. For example, California's hazardous sub-

41. 42 U.S.C. § 9601(14) (1988 and Supp. 1993); see *KFC W., Inc. v. Meghriq*, 49 F.3d 518 (9th Cir. 1995); *Wilshire Westwood Assoc. v. Atlantic Richfield, Corp.*, 881 F.2d 801 (9th Cir. 1989); *Ulvstad v. Chevron U.S.A., Inc.*, 818 F. Supp. 292 (C.D. Cal. 1993).

42. *Wilshire Westwood Assoc. v. Atlantic Richfield, Corp.*, 881 F.2d 801, 805 (9th Cir. 1989).

43. *Id.*; see also *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1080 (1st Cir. 1986); *United States v. Mottolo*, 605 F. Supp. 898, 902-05 (D.N.H. 1985); Frank P. Grad, *A Legislative History of The Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1-2 (1982). The three bills were H.R. 7020, 96th Cong. 2nd Sess. (1980), H.R. 85, 96th Cong. 1st Sess. (1979), and S. 1480, 96th Cong. 1st Sess. (1979). CERCLA was passed after very limited debate under a suspension of the rules. Of the three bills, only H.R. 85 addressed oil spills. H.R. 85 was reported to the Senate but no further action on the bill was taken. *Wilshire Westwood Assoc.*, 881 F.2d at 806.

44. 42 U.S.C. § 9601(14) (1989 and Supp. 1993), noted in *Wilshire Westwood Assoc.*, 881 F.2d at 803.

45. *Wilshire Westwood Assoc.*, 881 F.2d at 803. A perfect example of the confusion created by the lack of statutory guidance on the definition of petroleum and fractions is found on page 805 of the *Wilshire Westwood* case. There, the court in discussing components of petroleum reasoned:

In further support of their construction of the plain meaning of the petroleum exclusion, plaintiffs point out that the lead, benzene, ethylbenzene and toluene are hazardous substances covered by CERCLA if released as part of chemical wastes . . . , that ethylbenzene and xylene are hazardous substances when constituents of coal tar . . . , and that lead is a hazardous substance when it is a component of water-based paint

Id. at 805 (citations omitted). The court rejected plaintiff's argument, holding that "those same specifically listed substances would not be considered hazardous if released as a result of leaking underground gasoline storage tanks . . . cannot be what Congress intended. Such an interpretation would render meaningless the exception to the petroleum exclusion." *Id.*

stance Act defines "hazardous substances" broadly to include many dangerous chemicals listed in various state and federal laws.⁴⁶ Under the Act, petroleum, including crude oil or any fraction thereof which is not specifically listed or designated as a hazardous substance, is excluded from the Act.⁴⁷ In *Ulvestad v. Chevron U.S.A., Inc.*,⁴⁸ a Federal District Court in California was called upon to decide whether the petroleum exclusion in the Act applied to refined petroleum products.⁴⁹ The court noted that it was unaware of any published opinion either by a higher California court or any other federal court addressing the issue of whether the petroleum exclusion in

46. *Ulvestad v. Chevron U.S.A., Inc.*, 818 F. Supp. 292, 293 (C.D. Cal. 1993); CAL. HEALTH & SAFETY CODE § 25316 (West 1992 and Supp. 1995) provides:

"Hazardous substance" means:

(a) Any substance designated pursuant to Section 1321(b)(2)(A) of Title 33 of the United States Code.

(b) Any element, compound, mixture, solution, or substance designated pursuant to Section 102 of the federal act (42 U.S.C. 9602).

(c) Any hazardous waste having the characteristics identified under or listed pursuant to Section 6921 of Title 42 of the United States Code, but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by act of Congress.

(d) Any toxic pollutant listed under Section 1317(a) of Title 33 of the United States Code.

(e) Any hazardous air pollutant listed under Section 7412 of Title 42 of the United States Code.

(f) Any imminently hazardous chemical substance or mixture with respect to which the Administrator of the United States Environment Protection Agency has taken action pursuant to Section 2606 of Title 15 of the United States Code.

(g) Any hazardous waste or extremely hazardous waste as defined by Sections 25117 and 25115, respectively, unless expressly excluded.

Id.

47. *Ulvestad*, 818 F. Supp. at 293; CAL. HEALTH & SAFETY CODE § 25316 (West 1992 and Supp. 1995) provides:

"Hazardous substance" does not include:

(a) Petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance in subdivisions (a) to (f), inclusive, of Section 25316, and natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas), or the ash produced by a resource recovery facility utilizing a municipal solid waste stream.

(b) Nontoxic, nonflammable, noncorrosive stormwater run-off drained from underground vaults, chambers, or manholes into gutters or stormsewers.

Id.

48. *Ulvestad*, 818 F. Supp. at 292.

49. *Id.* at 293.

the Hazardous Substance Act applied to refined petroleum.⁵⁰ It also acknowledged that section 25317 of the Act expressly states that petroleum, crude oil, and crude oil fractions are excepted from the Act's reach, provided those fractions are not listed as "hazardous substances."⁵¹ The district court then reasoned that a crude oil fraction is a mixture or chemical compound derived from crude oil through "cracking" or a distillation process, and that gasoline is universally known to be a crude oil fraction.⁵² It then held that "because gasoline is a crude oil fraction, but is not specifically listed as a hazardous substance . . . , a plain reading of the statute reveals gasoline is exempt from the Act."⁵³ Equally important to the holding is the court's recognition of the utter chaos caused by the legislature's failure to define the term "petroleum."

The Court realizes the concerns this ruling may raise. Without clarifying action by the California Legislature, today's holding could impede future efforts by the Department to enforce clean-ups under the Act involving refined petroleum spills. Nevertheless, the plain meaning of the Act's petroleum exclusion is inescapable. In the absence of controlling authority, this court is compelled to reach this conclusion. It is for the California Legislature, not the courts, to clarify the Act if the Legislature wants to include refined petroleum.⁵⁴

It appears that because the California Hazardous Substance Act fails to define exactly what is encompassed within the term petroleum, plaintiffs have avoided the issue by filing their actions under nuisance and trespass. Ironically, the same type of confusion expressed by the court in *Ulvestad* is created by the current nuisance and trespass scheme. Namely, what constitutes a nuisance or trespass is not defined in the California Code, particularly as applied to environmental matters. As a result, courts are compelled to hypothesize as to the true meaning of an environmental nuisance or trespass, and as to when a cause of action under such theories accrues. Such lack of statutory guidance has led to inconsistent interpretations, many times within the

50. *Id.* at 294.

51. *Id.*

52. *Id.*

53. *Ulvestad v. Chevron U.S.A., Inc.*, 818 F. Supp. 292, 294 (C.D. Cal. 1993).

54. *Id.* at 297.

same jurisdiction, causing both plaintiffs and defendants in environmental nuisance and trespass litigation to question the actual availability of such remedies.

B. *The Ambiguity of What Constitutes a Nuisance*

A nuisance is defined as "[a]nything which is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property"⁵⁵ In some instances, what may be considered a nuisance is poorly defined in a statute,⁵⁶ while in some states nuisance appears to be a creature of the courts.⁵⁷ Under both scenarios, the result of failing to establish what constitutes a nuisance has been a lack of specific guidelines upon which future litigants can rely.

The law of nuisance recognizes two conflicting rights.⁵⁸ The first is that property owners may control their land and use it to benefit their interests.⁵⁹ The second is that the public and neighboring land owners have a right to prevent an unreasonable use of that land which substantially impairs the peaceful use and enjoyment of their land.⁶⁰ It is the "unreasonable use" aspect of nuisance that protects the rights of adjacent property owners.⁶¹ Unfortunately, as described be-

55. *Graveley Ranch v. Scherping*, 782 P.2d 371 (Mont. 1989) (citing MONT. CODE ANN. § 27-30-101 (1993)); see also *KFC W., Inc. v. Meghrig*, 49 F.3d 518 (9th Cir. 1995); *Resolution Trust Corp. v. Rossmoor Corp.*, 28 Cal. Rptr. 2d 328 (Ct. App. 1995); *Newhall Land and Farming v. Superior Court*, 23 Cal. Rptr. 2d 377 (Ct. App. 1993); *Capogeannis v. Superior Court*, 15 Cal. Rptr. 2d 796 (Ct. App. 1993); *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827 (Ct. App. 1991), *rev. granted*, 883 P.2d 387 (Cal. 1994); *Frank v. Environmental Sanitation Management, Inc.*, 687 S.W.2d 876 (Mo. 1985) (en banc); *Stevinson v. Deffenbaugh Indus.*, 870 S.W.2d 851 (Mo. Ct. App. 1993).

56. See *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827, 832 (Ct. App. 1991), *rev. granted*, 883 P.2d 387 (Cal. 1994); see also CAL. CIV. CODE § 3479 (West 1992 and Supp. 1995); MONT. CODE ANN. § 27-30-101 (1993).

57. *Schwartzman, Inc. v. Atchison, T. & S.F. Ry. Co.*, 857 F. Supp. 838, 844 (D.N.M. 1994); see also *Adams v. Star Enter.*, 851 F. Supp. 770, 774 (E.D. Va. 1994); *Frank v. Environmental Sanitation Management, Inc.*, 687 S.W.2d 876, 880 (Mo. 1985); *Stevinson v. Deffenbaugh Indus.*, 870 S.W.2d 851, 851 (Mo. Ct. App. 1993); *Ravan v. Greenville County*, 434 S.E.2d 296, 306 (S.C. Ct. App. 1993).

58. *Stevinson v. Deffenbaugh Indus.*, 870 S.W.2d 851, 854 (Mo. Ct. App. 1993).

59. *Id.*; see also *Frank v. Environmental Sanitation Management, Inc.*, 687 S.W.2d 876, 880 (Mo. 1985) (en banc); *Kueffer v. Brown*, 879 S.W.2d 658, 662 (Mo. Ct. App. 1994).

60. *Stevinson*, 870 S.W.2d at 854.

61. *Id.*

low, this attempt to balance rights, as opposed to establishing a comprehensive statutory scheme, causes a great deal of confusion for litigants.

There are two types of nuisances: public and private. These are two distinct causes of action that relate to the unreasonable interference with the use and enjoyment of land.⁶² Both of these causes of action will be discussed according to their respective characteristics and requirements.

1. *Private Nuisance*

Historically, the law of private nuisance applied to conflicts between neighboring, contemporaneous land uses.⁶³ A private nuisance cause of action arises when the injury inflicted either diminishes the value of that property, continually interferes with the power or control of that property, or causes a material disturbance or annoyance to the person in the use or occupation of that property.⁶⁴ Under a private nuisance theory, liability is imposed when there is an invasion of the interest of the private land use and such interference is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rule governing liability for abnormally dangerous conditions or activities.⁶⁵ Whether this invasion of the use and enjoyment of the property is a legal nuisance depends upon the facts and circumstances of each particular case.⁶⁶

Since private nuisance is a common law remedy, the facts and circumstances become secondary to the jurisdiction in which those facts and circumstances occurred. For example, at least one jurisdiction has held that "a party is liable for failing to abate a nuisance upon learning of it and having a reasonable opportunity to abate it."⁶⁷ In California, "the stat-

62. *Hydro-Manufacturing, Inc. v. Kayser-Roth*, 640 A.2d 950, 957 (R.I. 1994).

63. *Id.*; see also *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 314 (3rd Cir.), *cert. denied*, 474 U.S. 980 (1985); *Wellesley Hills Realty Trust v. Mobil Oil*, 747 F. Supp. 93, 98 (D. Mass. 1990).

64. *Adams v. Star Enter.*, 851 F. Supp. 770, 773 (D. Va. 1994), *aff'd*, 51 F.3d 417 (4th Cir. 1995); *Virginian Ry. Co. v. London*, 76 S.E. 306 (Va. 1912).

65. *National R.R. Passenger Corp. v. New York City Hous. Auth.*, 819 F. Supp. 1271, 1278 (S.D.N.Y. 1993).

66. *Adams*, 851 F. Supp. at 773 (citing *Bragg v. Ives*, 140 S.E. 656 (Va. 1927)).

67. *National R.R. Passenger Corp.*, 819 F. Supp. at 1279 (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2nd Cir. 1985)).

utory definition of nuisance appears to be broad enough to encompass almost every conceivable type of interference with the enjoyment of land or property."⁶⁸ Similarly, several jurisdictions have held that "under common law, a current owner cannot assert a private nuisance claim against a prior owner for contamination that occurred before the sale."⁶⁹ On the other hand, California courts have reasoned that "the California nuisance statutes have been construed, according to their broad terms, to allow an owner of property to sue for damages caused by nuisance created on the owner's property. Under California law, it is not necessary that a nuisance have its origin in neighboring property."⁷⁰ In short, some jurisdictions require a reasonable opportunity for the defendant to abate the private nuisance while other jurisdictions have no such requirement. Furthermore, some jurisdictions believe that ownership of the property during the creation of the nuisance is important, while other jurisdictions deem ownership irrelevant. Such inconsistencies only seek to serve the particular defendant or plaintiff in the respective jurisdiction. This example of a lack of uniformity in interpreting what constitutes a private nuisance only leads to protracted, and often unnecessary, litigation.

2. Public Nuisance

Unfortunately, litigation under a public nuisance theory also poses significant problems. A public nuisance is one "which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."⁷¹ Unlike a private nui-

68. *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827, 833 (Ct. App. 1991), *rev. granted*, 883 P.2d 387 (Cal. 1994) (citing *Stoiber v. Honeychuck*, 162 Cal. Rptr. 194 (Ct. App. 1980), and *People v. Stafford Packing Co.*, 227 P. 485 (Cal. 1924)).

69. *Hydro-Manufacturing, Inc. v. Kayser-Roth Corp.*, 740 A.2d 950, 957 (R.I. 1994); *see also Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303 (3rd Cir.), *cert. denied*, 474 U.S. 980 (1985); *Wilson Auto Enter., Inc. v. Mobil Oil Corp.*, 778 F. Supp. 101 (D.R.I. 1991); *Wellesley Hills Realty Trust v. Mobil Oil*, 747 F. Supp. 93 (D. Mass. 1990); *Amland Properties Corp. v. Aluminum Co. of America*, 711 F. Supp. 784 (D.N.J. 1989); *Sheehy v. Lipton Industries, Inc.*, 507 N.E.2d 781 (Mass. App. Ct. 1987).

70. *Mangini*, 281 Cal. Rptr. at 832.

71. CAL. CIV. CODE § 3480 (West 1993 and Supp. 1995); *Mangini*, 281 Cal. Rptr. at 832.

sance where there is an invasion of another's interest in the private use and enjoyment of land, a public nuisance is an unreasonable interference with a right common to the general public.⁷² Thus, a public nuisance does not necessarily create a private nuisance as well.⁷³ As a result, not everyone effected by a public nuisance possesses standing to recover damages created by that nuisance.⁷⁴ Only private individuals who suffer special damage distinct from damages to the general public may pursue an action for public nuisance.⁷⁵ To meet the "suffered special damages" requirement, a person must establish that he or she suffered harm of a different kind from that suffered by other members of the public.⁷⁶ In essence, successfully pursuing a public nuisance claim depends not just on the facts of the case but on how effectively the plaintiff pleads the case. If, for example, a person pleads that he or she suffered pecuniary harm because of the contamination of the property, then it is likely that such a claim would fail as a public nuisance cause of action.⁷⁷ Yet, if the same plaintiff, under the same fact scenario, alleged that he or she suffered special damages as a result of the defendant's interference with the plaintiff's use and enjoyment of the groundwater at the site or his or her right to pure water, then that plaintiff is likely to have effectively pleaded a cause of action under public nuisance.⁷⁸

Similarly, if a plaintiff alleges that an environmental nuisance is an absolute public nuisance then the plaintiff must establish that the creation of the nuisance was intentional.⁷⁹ On the other hand, if there is no allegation of an absolute public nuisance, then there is no obligation to estab-

72. *Hydro-Manufacturing, Inc.*, 640 A.2d at 955; see also *Citizens for Preservation of Waterman Lake v. Davis*, 420 A.2d 53 (R.I. 1980).

73. *Newhall Land and Farming Co. v. Superior Court*, 23 Cal. Rptr. 2d 377, 381 (Ct. App. 1993).

74. *Hydro-Manufacturing, Inc.*, 640 A.2d at 957.

75. *Id.*; see also *Iafrate v. Ramsden*, 190 A.2d 473 (R.I. 1963); *Radigan v. W.J. Halloran Co.*, 196 A.2d 160 (R.I. 1963).

76. *Hydro-Manufacturing, Inc.*, 640 A.2d at 955; see also *Capogeannis v. Superior Court*, 15 Cal. Rptr. 2d 796 (Ct. App. 1993); *Institoris v. City of Los Angeles*, 258 Cal. Rptr. 418 (Ct. App. 1989).

77. *Hydro-Manufacturing, Inc.*, 640 A.2d at 956; see also *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303 (3rd Cir. 1985).

78. *Hydro-Manufacturing, Inc.*, 640 A.2d at 956; see also *Mayor of Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039 (D.N.J. 1993).

79. *Westchester County v. Town of Greenwich*, 870 F. Supp. 496, 501 (S.D.N.Y. 1994); see also *Connecticut v. Trippetts-Abbett-McCarthy-Stratton*,

lish that defendants acted intentionally.⁸⁰ Therefore, it becomes essential that any plaintiff who seeks to pursue a claim under public nuisance carefully plead his or her case to avoid a dismissal.

To require someone to carefully plead a public nuisance argument or else face dismissal seems to completely ignore the purpose of allowing a person to bring an environmental claim under a public nuisance theory. The purpose of requiring one to remedy a public nuisance is to protect the health and welfare of the citizens.⁸¹ Yet, in these examples, protecting the health and safety of the citizens takes a back seat to the careful articulation of lawyers. Such a requirement seems to contradict the very reason for having environmental laws, and further establishes why changing the current environmental nuisance laws to a uniform format is essential.

C. *The Ambiguity of What Constitutes Environmental Trespass*

Most of the environmental claims filed under common law theories combine general nuisance and trespass theories.⁸² Much of the confusion created under these two theories has been a result of interpreting the theories as virtually

527 A.2d 688 (Conn. 1987); *County of Westchester v. Town of Greenwich*, 745 F. Supp. 951 (S.D.N.Y. 1990).

80. *Westchester County*, 870 F. Supp. at 501.

81. See *Newhall Land and Farming Co. v. Superior Court*, 23 Cal. Rptr. 2d 377, 381 (Ct. App. 1993) ("Pollution of water constitutes a public nuisance In fact, water pollution occurring as a result of treatment or discharge of wastes in violation of Water Code section 13000, et seq. is a public nuisance per se.") (citations omitted).

82. See *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33 (D. Me. 1994); *Mortkowitz v. Texaco Inc.*, 842 F. Supp. 1232 (N.D. Cal. 1994); *Nissan Motor Corp. v. Maryland Shipbuilding and Drydock Co.*, 544 F. Supp. 1104 (D. Md. 1982); *KFC W., Inc. v. Meghriq*, 28 Cal. Rptr. 2d 676 (Ct. App. 1994); *Newhall Land and Farming Co. v. Superior Court*, 23 Cal. Rptr. 2d 377 (Ct. App. 1993); *Capogeannis v. Superior Court*, 15 Cal. Rptr. 2d 796 (Ct. App. 1993); *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827 (Ct. App. 1991), *rev. granted*, 883 P.2d 387 (Cal. 1994).

identical.⁸³ There are significant differences between the theories of nuisance and trespass.⁸⁴

While environmental trespass and nuisance often occur concurrently, the two torts are distinct.⁸⁵ A claim of trespass contemplates actual physical entry or invasion, whereas nuisance liability arises merely by virtue of an activity which falls short of tangible, concrete invasion but interferes with the use and enjoyment of land.⁸⁶ In essence, the definition of trespass in environmental matters is narrower than the definition of nuisance⁸⁷ and nuisance covers a much broader range of property rights, including the use and enjoyment of the property.⁸⁸ In other words, the difference between trespass and nuisance is that a trespass in environmental matters is any intentional invasion of the plaintiff's interest in

83. See *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827, 833 (Ct. App. 1991), *rev. granted*, 883 P.2d 387 (Cal. 1994) ("California cases have also recognized that invasions of plaintiff's property, otherwise amounting to a trespass, may also constitute a nuisance under the statutes."). In *Mangini* the court also noted:

There may . . . be some overlapping of the causes of action for trespass and private nuisance. An invasion of the possession of land normally involves some degree of interference with its use and enjoyment and this is true particularly when some harm is inflicted upon the land itself. The cause of action for trespass has traditionally included liability for incidental harms of this nature. If the interference with the use and enjoyment of the land is a significant one, sufficient in itself to amount to a private nuisance, the fact that it arises out of or is accompanied by a trespass will not prevent recovery for the nuisance, and the action may be maintained upon either basis as the plaintiff elects or both. Thus the flooding of the plaintiff's land, which is a trespass, is also a nuisance if it is repeated or of long duration; and when the defendant's dog howls under the plaintiff's window night after night and deprives him of sleep, there is a nuisance whether the dog is outside the plaintiff's land or has entered upon it, and the defendant's negligence in looking after the dog would make him liable either for trespass if there was an entry or for nuisance whether there was entry or not. The two actions, trespass and private nuisance, are thus not entirely exclusive or inconsistent, and in a proper case in which the elements of both actions are fully present, the plaintiff may have his choice of one or the other, or may proceed upon both.

Id. at n.6.

84. *Schwartzman, Inc. v. Atchison, T. & S.F. Ry. Co.*, 857 F. Supp. 838, 844 (D.N.M. 1994).

85. *Adams v. Star Enter.*, 851 F. Supp. 770, 772 n.4 (E.D. Va. 1994), *aff'd*, 51 F.3d 417 (4th Cir. 1995).

86. *Schwartzman, Inc.*, 857 F. Supp. at 844.

87. *Capogeannis v. Superior Court*, 15 Cal. Rptr. 2d 796, 799 (Ct. App. 1993).

88. *Adams*, 851 F. Supp. at 773 n.4.

the exclusive possession of his property, while nuisance is a substantial interference with the plaintiff's use and enjoyment.⁸⁹ Confusion arises here since many plaintiffs assume that because they may have an environmental claim under nuisance, it follows that they also have a claim under a trespass theory as well. Such is not always the case. For example, courts have held that under a trespass theory, a person cannot be found liable if the act in question was "an unintentional non-negligent entry, even if harm is done."⁹⁰ At a bare minimum, plaintiffs must at least establish that the defendant's negligence caused the waste to enter plaintiff's land.⁹¹ Moreover, plaintiffs cannot prevail in a trespass claim when the only damage that the plaintiff suffers is a stigma.⁹² Plaintiffs also cannot prevail where groundwater wells are not contaminated.⁹³ One court has even held that a person cannot trespass on his own land.⁹⁴ By contrast, if properly plead under nuisance, a plaintiff can recover against a party who unintentionally deposited waste on the plaintiff's property.⁹⁵ Similarly, courts have also held that even if a person has not suffered any actual damage, he or she may still recover under a public nuisance theory.⁹⁶ There is little differ-

89. *Ravan v. Greenville County*, 434 S.E.2d 296, 306 (S.C. Ct. App. 1993) (citing WILLIAM H. RODGERS, JR., *HANDBOOK ON ENVIRONMENTAL LAW* § 2.13 (1977)).

90. *Nissan Motor Corp. v. Maryland Shipbuilding & Drydock Co.*, 544 F. Supp. 1104, 1116 (D. Md. 1982).

91. *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 48 (D. Me. 1994) (citing *Hayes v. Bushey*, 196 A.2d 823, 826 (Me. 1964)).

92. *Adams*, 851 F. Supp. at 773.

93. *Williams v. Allied Automotive Autolite Div.*, 704 F. Supp. 782 (N.D. Ohio 1988).

94. *Capogeannis v. Superior Court*, 15 Cal. Rptr. 2d 706, 799 (Ct. App. 1993).

95. *Nissan Motor Corp. v. Maryland Shipbuilding & Drydock Co.*, 544 F. Supp. 1104, 1116-17 (D. Md. 1982). There the court rejected the plaintiff's cases which allowed recovery for smoke damage. *Id.* The court noted that in those cases "it would appear that the law of nuisance was applied rather than the law of trespass." *Id.* at 1117.

96. *Koll-Irvine Ctr. v. County of Orange*, 29 Cal. Rptr. 2d 664, 668 (Ct. App. 1994) ("No invasion of an interest in land is required for [a public nuisance] action, and the public entity need not show unique damages."); *cf. Adams*, 851 F. Supp. at 774, where the court reasoned:

Apart from the stigma damage, plaintiffs have alleged that the remediation efforts have interfered with community functions and created other disturbances. The court finds that although these allegations are properly pled, they allege only temporary disturbances, while the damages sought reflect permanent injuries. [T]he general rule in

ence as to what damages may be recovered under either a nuisance or trespass claim⁹⁷ and, generally, there is virtually no difference between the two for statute of limitation purposes.⁹⁸ Due to the numerous obstacles faced when pleading a trespass claim, courts have made the trespass claim obsolete and virtually useless when such claims could be encompassed by a nuisance claim. This result is similar to the status possessed by the trespass theory under early English common law.

Nevertheless, most plaintiffs feel compelled to allege a trespass theory to preserve a cause of action. This is a perfect example of how the lack of statutory distinction between trespass and nuisance has created much of the confusion litigants confront when pursuing common law environmental claims.

such circumstances is plaintiff may bring repeated actions to recover for nuisance so long as the nuisance continues. However, a defendant will not be made to pay for a continuous nuisance that will some time abate.

Id. (citing *Portsmouth Cotton Oil Ref. Corp. v. Richardson*, 88 S.E. 317 (Va. 1916) and *Norfolk & W. Ry. Co. v. Allen*, 87 S.E. 558 (Va. 1915)). The key here is that the *Koll-Irvine Center* court, through its holding, has implicitly stated that damages can be recovered under nuisance for stigma alone. *Koll-Irvine Ctr.*, 29 Cal. Rptr. 2d at 668.

97. One legal commentator has argued, "[w]hile trespass and nuisance will often appear to overlap, there are certain advantages to the suit in trespass. Since the law infers some damage from every unauthorized invasion of another's land, trespass requires no proof of actual injury." See Robert R. Lohrman, Comment, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories To Control Pollution*, 16 WAYNE L. REV. 1085, 1117 (1970). However, this premise is of little significance in environmental cases, since most environmental cases, particularly those that involve groundwater and soil contamination, very seldom have only nominal damages.

98. See *Capogeannis*, 15 Cal. Rptr. 2d at 800, where the court, in discussing the statute of limitations under both nuisance and trespass, reasoned:

The answer depends on long-established distinctions between *permanent* and *continuing* nuisance and trespasses. The analysis is essentially the same for trespass as it is for nuisance. For convenience of statement and citation we shall for the most part refer only to nuisance, but our conclusions apply as well to the *Capogeannis*' trespass theory against Tri-Pallet.

Id. Similarly, in *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827, 842 (Ct. App. 1991), *rev. granted*, 883 P.2d 387 (Cal. 1994), the court stated that, "the application of the statute of limitations for trespass has been the same as for nuisance and has depended on whether the trespass is continuing or permanent." *Mangini*, 281 Cal. Rptr. at 842. However, compare Lohrmann, *supra* note 97, at 1117 n.180, where the author notes that Oregon has a six year statute of limitations for trespass claims and a two year statute of limitations for nuisance actions.

D. *The Problem of Accrual*

1. *The Establishment of Continuing and Permanent Nuisance and Trespass Claims for Statute of Limitations Purposes*

Determining what causes of action must be plead in environmental nuisance and trespass cases is both complicated and confusing. However, it is far more complicated to determine when those causes of action arise. Courts have attempted to address the problem of determining when a cause of action exists and the time frame in which potential plaintiffs have to file such a cause of action. One must divide the nuisance and trespass claims into two separate categories: continuing nuisance and trespass claims, and permanent nuisance and trespass claims.⁹⁹ Whether a nuisance is temporary or permanent is frequently difficult to determine.¹⁰⁰ In reality, the primary purpose of determining whether a nuisance or trespass is continuing or permanent is to establish the outcome of a particular case or the legal effects of certain defenses, such as the statute of limitations.¹⁰¹ Consequently, determining when a nuisance or trespass commences or is tolled for statute of limitations purposes is also a difficult issue.¹⁰²

A nuisance or trespass is continuing if it is capable of being abated.¹⁰³ Historically, however, there was a presumption that all nuisances and trespasses were not continuing and the remedy for a continuing nuisance or trespass was either a suit for injunctive relief or successive actions for damages as new injuries occurred.¹⁰⁴ Yet, situations developed where injunctive relief was not appropriate or where successive actions were undesirable to defendant and plain-

99. See *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866, 869 (Cal. 1985); *Capogeannis v. Superior Court*, 15 Cal. Rptr. 2d 706, 800 (Ct. App. 1993); *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827, 841 (Ct. App. 1991), *rev. granted*, 883 P.2d 387 (Cal. 1994); *Spar v. Pacific Bell*, 1 Cal. Rptr. 2d 480, 480 (Ct. App. 1991).

100. *Graveley Ranch v. Scherping*, 782 P.2d 371, 373 (Mont. 1989).

101. *Stevinson*, 870 S.W.2d at 855; *Graveley Ranch*, 782 P.2d at 373.

102. *Sachs v. Exxon Co.*, 12 Cal. Rptr. 2d 237, 237 (Ct. App. 1992); *see also Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827, 844 (Ct. App. 1991), *rev. granted*, 883 P.2d 387 (Cal. 1994).

103. *KFC W., Inc. v. Meghrig*, 28 Cal. Rptr. 2d 676, 685 (Ct. App. 1994).

104. *Capogeannis v. Superior Court*, 15 Cal. Rptr. 2d 796, 800 (Ct. App. 1993); *see also Spaulding v. Cameron*, 239 P.2d 625, 627 (Cal. 1952).

tiff alike.¹⁰⁵ In such situations, it was recognized that some types of nuisance or trespass should be considered permanent, and in those cases recovery of past and anticipated future damages would be allowed in one action.¹⁰⁶

Once again, there is no single, all inclusive rule to determine whether an environmental nuisance or trespass is continuing or permanent, and each case must be decided on its specific facts.¹⁰⁷ However, when there is doubt as to the permanency of the injury caused by the environmental nuisance or trespass, courts are inclined to favor the right of plaintiffs to bring successive actions.¹⁰⁸ Furthermore, courts are also inclined to allow plaintiffs to elect whether they are proceeding under a continuing or permanent nuisance theory.¹⁰⁹ These options are made available to plaintiffs to avoid giving the defendant, because of his wrongful act, the right to continue the wrong; a wrong courts deem equivalent to an easement.¹¹⁰ This doctrine of election is designed to facilitate a just and equitable recovery.¹¹¹

Proving when claims for environmental nuisance or trespass are time barred depends upon when these causes of action accrue.¹¹² The question of when a cause of action accrues in such a case is generally a mixed question of law and fact.¹¹³ The traditional rule in tort matters is that the applicable limitation period begins to run "upon the occurrence of the last element essential to the cause of action."¹¹⁴ In the case of permanent environmental nuisance or trespass actions, the statute of limitations begins to run from the date of

105. *Capogeannis*, 15 Cal. Rptr. 2d at 800.

106. *Id.*

107. *Beatty v. Washington Metro. Area Transit Auth.*, 860 F.2d 1117, 1125 (D.C. Cir. 1988).

108. *Field-Escandon v. DeMann*, 251 Cal. Rptr. 49, 52 (Ct. App. 1988); see also *Kafka v. Bozio*, 218 P. 743, 753 (Cal. 1923).

109. *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827, 839 (Ct. App. 1991), *rev. granted*, 883 P.2d 387 (Cal. 1994) (citing *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866, 871 (Cal. 1985); *Spaulding v. Cameron*, 239 P.2d 625, 628 (Cal. 1952)).

110. *Field-Escandon*, 251 Cal. Rptr. at 52; *Kafka*, 218 P. at 755-56.

111. *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866, 866 (Cal. 1985).

112. *Mortkowitz v. Texaco, Inc.*, 842 F. Supp. 1232, 1237 (N.D. Cal. 1994); see also *Leaf v. City of San Mateo*, 163 Cal. Rptr. 711, 715 (Ct. App. 1980).

113. *Leaf v. City of San Mateo*, 163 Cal. Rptr. 711, 715 (Ct. App. 1980).

114. *Mortkowitz*, 842 F. Supp. at 1237; *CAMSI IV v. Hunter Technology Corp.*, 282 Cal. Rptr. 80, 84 (Ct. App. 1991).

the act causing immediate and permanent injury.¹¹⁵ Where the permanent injury is the result of a series of acts by the defendant, the general rule is that the statute of limitations runs from the date of the last act.¹¹⁶ Moreover, for purposes of the statute of limitations, the harm implicit in a tortious injury is the harm to the property itself.¹¹⁷

Again, here is where much of the confusion lies. Specifically, with a continuing nuisance or trespass environmental claim "every repetition of the continuing nuisance is a separate wrong subject to a separate litigation period for which the person injured may bring successive actions until the nuisance is abated, even though an action based on the original wrong may be barred."¹¹⁸ In analyzing when an action accrues as a result of the last act causing injury, it is apparent that the traditional rules for tort cases are not cohesive with environmental common law claims. When there is permanent groundwater contamination, for example, the groundwater migrates causing a new permanent injury; namely new contamination of groundwater. As such, it could be argued that each movement of the groundwater contamination is a separate wrong subject to a separate limitation period.¹¹⁹ Such is not the case as courts have reasoned that "[f]or a permanent nuisance, the period of limitations runs immediately upon the creation of the permanent nuisance and bars all claims of damage, present and future, after lapse of the statutory period."¹²⁰

In essence, when discussing the statute of limitations in permanent nuisance and trespass cases versus continuing nuisance and trespass cases, the primary emphasis has been on when the plaintiff knew or should have known about the contamination and what damages can be recovered under what theory, not on when the actual injury occurred.¹²¹

115. *Morkowitz*, 842 F. Supp. at 1237; *CAMSI IV*, 282 Cal. Rptr. at 84.

116. *Morkowitz*, 842 F. Supp. at 1237.

117. *Id.*

118. *Capogeannis v. Superior Court*, 15 Cal. Rptr. 2d 796, 800 (Ct. App. 1993) (quoting *Phillips v. City of Pasadena*, 162 P.2d 625, 626-27 (Cal. 1945).

119. *Capogeannis*, 15 Cal. Rptr. 2d at 800.

120. *Stevinson v. Deffenbaugh Indus., Inc.*, 870 S.W.2d 851, 855 (Mo. Ct. App. 1993) (citing *Rebel v. Big Tarkio Drainage Dist.*, 602 S.W.2d 787, 792 (Mo. Ct. App. 1980)).

121. *Id.*; see also *Beatty v. Washington Metro. Area Transit Auth.*, 860 F.2d 1117, 1125 (D.C. Cir. 1988); *Morkowitz v. Texaco, Inc.*, 842 F. Supp. 1232, 1237 (N.D. Cal. 1994); *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d

While logic supports the courts' distinction between the knowledge requirement and when the actual injury occurred, the language used by the courts does not support or readily establish such a distinction. The ambiguity of the language should not be blamed upon the courts.

Instead, much of the blame lies with the legislature. The legislature has failed to compel plaintiffs to abandon common law environmental nuisance and trespass actions for many of the environmental laws in place today. This has allowed, and in some instances forced, plaintiffs to bring claims under common law theories which are inappropriate for the result sought.

2. *Statute of Limitations and Burden of Proof*

By failing to address the actual injury argument appropriately, courts have also failed to consistently address the next logical issue; namely, who has the burden of proof to establish damages when parts of the injury occurred within the statute of limitations and parts of the injuries occurred outside of the statutory period. Some courts have held that when parts of an environmental injury occur within the appropriate statute of limitations period and other parts occur outside the statute of limitations, the burden is on the plaintiff to establish what damages occurred within such period.¹²² The reason courts place the burden on the plaintiff is to prevent the plaintiff from postponing the bringing of the action.¹²³ Whether part of the claim is based on permanent nuisance and the other parts are brought under a continuing nuisance theory,¹²⁴ or whether the plaintiff is only seeking injunctive relief,¹²⁵ the burden remains with the plaintiff.

On the other hand, many courts have also held that the statute of limitations is an affirmative defense, and that the

866, 872 (Cal. 1985); *Capogeannis*, 15 Cal. Rptr. 2d at 800; *CAMSI IV v. Hunter Technology Corp.*, 282 Cal. Rptr. 80, 85 (Ct. App. 1991); *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827, 837-39 (Ct. App. 1991), *rev. granted*, 883 P.2d 387 (Cal. 1994); *Field-Escandon v. DeMann*, 251 Cal. Rptr. 49, 52-53 (Ct. App. 1988).

122. *Parro v. Fifteen Oil Co.*, 26 So.2d 30, 33 (La. Ct. App. 1946) (citing *Howell v. City of Dothan*, 174 So. 624, 628 (Ala. 1937)).

123. *Parro*, 26 So.2d at 33.

124. *Id.*

125. *Id.*

burden of proof rests with the party pleading it.¹²⁶ Thus, where part of the plaintiff's case is barred and the other is not, the defendant, not the plaintiff, is required to prove which part falls specifically within the protection of the statute.¹²⁷ The reasoning, like the conclusion, differs from the reasoning used to justify why the plaintiff should bear the burden of proof by other courts. Here, the courts have held that "the obligation to segregate the damage should fall upon the wrongdoer and not upon the person harmed."¹²⁸ Finally, to bring the confusion of the issue closer to home, California has not developed a firm stand on this issue. The implication, however, is that the plaintiff has the burden of proof.¹²⁹ Nevertheless, both plaintiffs and defendants are again hindered by the lack of statutory guidance under the common environmental nuisance and trespass law.

3. *Discovery Rule*

Finally, in regards to the knowledge of the plaintiff at the time the contamination was created, California courts have attempted to bring equity into the equation by developing the so-called discovery rule. The discovery rule postpones the commencement of the limitations period until the plaintiff discovers, or should have discovered, all of the facts essential to the cause of action.¹³⁰ Specifically, commencement of the limitations period is postponed until either the plaintiff actually discovers the injury and its negligent cause or could have discovered the injury and cause through the exercise of reasonable diligence;¹³¹ subjective suspicion is not required.¹³²

126. *Henderson v. Pennwalt Corp.*, 704 P.2d 1256, 1263 (Wash. Ct. App. 1985); *see also* *Sanders v. Merchants' State Bank*, 182 N.E. 897, 903 (Ill. 1932); *Golden v. Lerch Bros.*, 281 N.W. 249, 253 (Minn. 1938); *Girson v. Girson*, 114 P.2d 274, 275 (Mont. 1941); *Block v. Briendel*, 174 N.Y.S.2d 389 (App. Div. 1958); *Furrer v. Talent Irrigation Dist.*, 466 P.2d 605, 617-18 (Or. 1970); *Buck v. Newberry*, 47 S.E. 889, 890 (W. Va. 1904).

127. *Henderson v. Pennwalt Corp.*, 704 P.2d 1256, 1263 (Wash. Ct. App. 1985).

128. *Id.* at 1262 (citing *Furrer v. Talent Irrigation Dist.*, 466 P.2d 605, 617-18 (Or. 1970)).

129. *See O'Hair v. California Prune & Apricot Growers' Ass'n*, 20 P.2d 375 (Ct. App. 1933); *Mangini v. Aerojet-General Corp.*, 31 Cal. Rptr. 2d 696 (Ct. App.) (en banc), *rev. granted*, 883 P.2d 387 (Cal. 1994) [hereinafter *Mangini II*].

130. *Mortkowitz v. Texaco, Inc.*, 842 F. Supp. 1232, 1238 (N.D. Cal. 1994); *CAMSI IV v. Hunter Technology Corp.*, 282 Cal. Rptr. 80, 85 (Ct. App. 1991).

131. *Mortkowitz*, 842 F. Supp. at 1238.

Establishing when the plaintiff should have discovered the contamination is as murky as the contamination itself. The discovery rule is designed to eliminate the harshness of the traditional application of the limitations period where it would be "manifestly unjust to deprive a plaintiff of a cause of action before he is aware that he has been injured."¹³³ The rule is premised upon the idea that statutes of limitations are intended to run against those individuals that fail to exercise reasonable care in protection of their rights.¹³⁴ Consequently, the limitations should not be interpreted as a bar to a victim of wrongful conduct asserting a cause of action before the person could reasonably be expected to discover its existence.¹³⁵ Instead, the discovery rule in California is viewed as a protector of the "blamelessly ignorant."¹³⁶ Yet, seldom is the discovery rule effectively plead by a plaintiff.¹³⁷

A plaintiff who intends to rely upon the discovery rule must first plead specific facts which show the time and manner of discovery and the inability to have made an earlier discovery despite reasonable diligence.¹³⁸ California courts see this pleading requirement as a procedural safeguard against lengthy litigation on the issue of accrual.¹³⁹ Next, if the plaintiff becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed in such an investigation.¹⁴⁰ The key here is that the plaintiff is not required to have actual knowledge.¹⁴¹ Thus, for example, when statewide agencies order an investigation of the groundwater and soil because contamination has been discovered, a plaintiff is

132. *Id.*; *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827, 843 (Ct. App. 1991), *rev. granted*, 883 P.2d 387 (Cal. 1994).

133. *Mangini*, 281 Cal. Rptr. at 843; *see also Morkowitz*, 842 F. Supp. at 1238; *Leaf v. City of San Mateo*, 163 Cal. Rptr. 711, 717 (Ct. App. 1980).

134. *Morkowitz*, 842 F. Supp. at 1238; *CAMSI IV*, 282 Cal. Rptr. at 86.

135. *Morkowitz*, 842 F. Supp. at 1238.

136. *Id.* (quoting *Leaf*, 163 Cal. Rptr. at 843).

137. *See Morkowitz*, 842 F. Supp. at 1238; *CAMSI IV*, 282 Cal. Rptr. at 86; *Mangini*, 281 Cal. Rptr. at 843.

138. *Morkowitz*, 842 F. Supp. at 1238; *CAMSI IV*, 282 Cal. Rptr. at 86.

139. *Mangini*, 281 Cal. Rptr. at 843; *April Enter., Inc. v. KTTV*, 195 Cal. Rptr. 421, 432-33 (Ct. App. 1983).

140. *Mangini*, 281 Cal. Rptr. at 843; *see also Morkowitz*, 842 F. Supp. at 1238; *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 927 (Cal. 1988); *Miller v. Bechtel Corp.*, 663 P.2d 177, 182 (Cal. 1983).

141. *Morkowitz*, 842 F. Supp. at 1239.

deemed to have sufficient knowledge for statute of limitations purposes.¹⁴² Furthermore, California courts have held that plaintiffs possess the requisite knowledge to initiate the running of the statute of limitations when plaintiffs fail to comply with environmental statutory requirements, regardless of their knowledge of the environmental statute's existence.¹⁴³ The statute also runs when plaintiffs become aware that the defendant had engaged in activities of a potentially hazardous nature,¹⁴⁴ such as operating a gasoline station.¹⁴⁵ In summary, it appears that the discovery rule is nothing more than form, because it really offers no protection to plaintiffs who seek to establish that they acted in good faith in not filing within the allotted time period.

E. *The Confusion in the Permanent/Continuing Nuisance and Trespass Distinction*

Determining what damages are to be recovered in environmental nuisance and trespass claims is also very complicated and confusing. Much of the confusion and complications revolve around whether the nuisance or trespass damage is deemed to be continuing or permanent.¹⁴⁶ Whether the damage caused by environmental contamination is permanent or continuing is generally a question of fact based upon the extent and nature of the contamination.¹⁴⁷ Consequently, plaintiffs are compelled to establish the nature and extent of the damage suffered since continuing nuisance and trespass claims have different statute of limitations, different defenses, different theories of recovery and ultimately

142. *CAMSI IV*, 282 Cal. Rptr. at 86-87.

143. *Morkowitz*, 842 F. Supp. at 1239-40.

144. *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827, 844 (Ct. App. 1991), *rev. granted*, 883 P.2d 387 (Cal. 1994) (citing *Fair v. Stevenot*, 29 Cal. 486, 488-89 (1866); *American Medical Int'l, Inc. v. Feller*, 131 Cal. Rptr. 270, 277 (Ct. App. 1976)).

145. *Morkowitz*, 842 F. Supp. at 1240.

146. When assessing damages, courts generally treat nuisance and trespass claims similarly, since the emphasis is on whether the nuisance or trespass is permanent or continuing, not on what type of cause of action exists. See *Capogeannis v. Superior Court*, 15 Cal. Rptr. 2d 796, 800 (Ct. App. 1993); *Mangini*, 281 Cal. Rptr. at 841.

147. *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827, 841 (Ct. App. 1991), *rev. granted*, 883 P.2d 387 (Cal. 1994); *see also Mangini II*, 31 Cal. Rptr. 2d 696, 703 (Ct. App.), *rev. granted*, 883 P.2d 387 (Cal. 1994).

different remedies from permanent nuisance and trespass claims.¹⁴⁸

Unfortunately, without any sort of statutory guidance, courts have been unable to fully articulate exactly what information must be provided by a plaintiff to meet his legal burden. Many times, courts are fortunate enough to have the regulators determine whether contamination can be abated.¹⁴⁹ Yet, in some instances, courts do not have this luxury and are compelled to make difficult decisions regarding the status of the contamination.¹⁵⁰ It is under these circumstances that many courts, without statutory guidance, are forced to hypothesize how much evidence they believe is sufficient to present the case to the jury. Requiring the courts to make such technical decisions for purposes of assessing damages extends many courts beyond their expertise and further establishes why a uniform statutory standard for environmental nuisance and trespass claims needs to be established.

In California, under a continuing nuisance claim, a person may bring successive actions and seek damages against those responsible for the continuing nuisance until the nuisance is abated.¹⁵¹ While what constitutes "damages" is not artfully defined, the general implication is that damages, under a continuing nuisance claim, "should be confined to that period of time reasonably necessary to 'repair' the business, i.e. to get it back into operation at its former capacity."¹⁵²

148. *Stevinson v. Deffenbaugh Indus.*, 870 S.W.2d 850, 855 (Mo. Ct. App. 1994).

149. *See Capogeannis v. Superior Court*, 15 Cal. Rptr. 2d 796, 805 (Ct. App. 1993). The court held:

We are not persuaded by the Spences' essentially semantic argument that because it does not appear the contamination can ever be wholly removed the nuisance must be deemed permanent. We are satisfied to presume that cleanup standards set by responsible public agencies sufficiently reflect expert appraisal of the best that can be done to abate contamination in particular cases. As judges we will not presume to insist upon absolutes these agencies do not require.

Id.

150. *Mangini II*, 31 Cal. Rptr. 2d 696 (Ct. App.), *rev. granted*, 883 P.2d 387 (Cal. 1994). The court was forced to review the issues of abatability, and what the evidence showed regarding abatability. *Id.*

151. *See Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866, 871 (Cal. 1985); *Mangini*, 281 Cal. Rptr. at 838; *Capogeannis*, 15 Cal. Rptr. at 800-02.

152. *Blake v. E. Thompson Petroleum Repair Co., Inc.*, 216 Cal. Rptr. 568, 574 (Ct. App. 1985).

In other words, plaintiffs are only entitled to recover the damages incurred during the period of interruption.¹⁵³ Such damages include lost business profits,¹⁵⁴ injunctive relief,¹⁵⁵ and the depreciation of the rental or usable value during the injury.¹⁵⁶

The law in California is relatively clear with respect to continuing environmental nuisance and trespass claims under the above mentioned scenarios. However, there are many aspects of the law that remain confusing. For example, under a private continuing nuisance claim, damages for emotional distress may be awarded.¹⁵⁷ However, the claim must be based upon injuries to the person that are special to him and different to the harm suffered by the general public.¹⁵⁸ In short, the availability of an emotional distress claim in a continuing environmental nuisance or trespass case is quite limited.

*Cassinov v. Union Oil Company of California*¹⁵⁹ is an example of how California courts have failed to adequately articulate what damages are recoverable in a continuing nuisance case. In *Cassinov*, the court held "deterioration in market value of property is the proper measure for continuing nuisance which cannot be abated. Such measures of damages are proper even if the actual injury to the property is nominal."¹⁶⁰ However, the phrase "continuing nuisance which cannot be abated" is a contradiction. According to the definition previously cited,¹⁶¹ a continuing nuisance is capa-

153. *Id.*

154. *Id.*

155. *Mangini*, 281 Cal. Rptr. at 838; *Capogeannis*, 15 Cal. Rptr. 2d at 796.

156. See *FDIC v. Jackson-Shaw Partners* No. 46, 850 F. Supp. 839 (N.D. Cal. 1994); *Spaulding v. Cameron*, 239 P.2d 625 (Cal. 1952); *Qualls v. Smyth*, 307 P.2d 29 (Cal. Ct. App. 1957); *Spaulding v. Cameron*, 274 P.2d 177 (Cal. Ct. App. 1954); *Guttinger v. Calaveras Cement Co.*, 233 P.2d 914 (Cal. Ct. App. 1951); *Ingram v. City of Gridley*, 224 P.2d 788 (Cal. Ct. App. 1951); *Alexander v. Arkansas City*, 396 P.2d 311 (Kan. 1964).

157. *Koll-Irvine Center v. County of Orange*, 29 Cal. Rptr. 2d 644, 668 (Ct. App. 1994); see also *Smith v. County of Los Angeles*, 262 Cal. Rptr. 754, 766 (Ct. App. 1989); *Institoris v. City of Los Angeles*, 258 Cal. Rptr. 418, 424 (Ct. App. 1989); *Sher v. Leiderman*, 226 Cal. Rptr. 698, 706 (Ct. App. 1986).

158. *Institoris v. City of Los Angeles*, 258 Cal. Rptr. 418, 424 (Ct. App. 1989) (citing *Venuto v. Owens-Corning Fiberglas Corp.*, 99 Cal. Rptr. 350, 355 (Ct. App. 1971)).

159. 18 Cal. Rptr. 2d 574 (Ct. App. 1993).

160. *Id.* at 583.

161. See discussion *supra* notes 98-104 and accompanying text.

ble of abatement. Thus, the definition implies that the damage must be permanent. Yet, the court applied this holding to a continuing nuisance claim, implying that so long as the property will be restored to its previous value when the nuisance is removed, plaintiffs are entitled to recover the losses incurred during the period in which the nuisance occupied the property. Nevertheless, the holding is unclear, further clouding an already mind-boggling interpretation of what damages are recoverable in a continuing environmental nuisance and trespass case.

Attempting to recover damages in a permanent environmental nuisance and trespass case is also complicated. In a permanent environmental nuisance or trespass case, the plaintiff is entitled to recover permanent damages, including the diminution in property value.¹⁶² However, two critical problems develop when one pursues permanent damages in an environmental nuisance and trespass case. First, courts generally treat environmental nuisances and trespasses as continuing, not permanent. As noted by the court in *Capogeannis*:

Over the years the courts, presumably mindful of the genesis of permanent nuisance as a practical exception to a preferred rule, have maintained a preference for finding a continuing nuisance, both to protect the plaintiff from "contingencies" such as unforeseen injury and the statute of limitations itself and to encourage abatement of nuisances.¹⁶³

Therefore, plaintiffs have the burden of establishing when the damages are permanent. Otherwise, the case proceeds under a continuing nuisance theory. This approach created a problem for courts since the courts never articulated who had the burden of establishing whether the damages were indeed permanent or continuing. Recently, one court held that the burden belongs to the plaintiff.¹⁶⁴ While

162. *Capogeannis v. Superior Court*, 15 Cal. Rptr. 2d 796, 800 (Ct. App. 1993); see also *Adams v. Star Enter.*, 851 F. Supp. 770, 774 (E.D. Va. 1994), *aff'd*, 51 F.3d 417 (4th Cir. 1995); *Mangini II*, 31 Cal. Rptr. 2d 696, 708 (Ct. App.), *rev. granted*, 883 P.2d 387 (Cal. 1994); *Ravan v. Greenville County*, 434 S.E.2d 296, 307 (S.C. Ct. App. 1993).

163. *Capogeannis*, 15 Cal. Rptr. 2d at 802 (citations omitted); see also *United States v. Dickinson*, 331 U.S. 745 (1947); *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827, 838 (Ct. App. 1991), *rev. granted*, 883 P.2d 387 (Cal. 1994).

164. *Mangini II*, 31 Cal. Rptr. 2d at 696.

it was a California Supreme Court ruling,¹⁶⁵ it is highly unlikely that many new plaintiffs or defendants will see the decision as solving many of the problems created by classifying an environmental nuisance claim as permanent or continuing.

The second problem that courts have inconsistently addressed is whether permanent damages can be recovered under a continuing nuisance theory. In California, as well as most other jurisdictions, courts have held that permanent damages cannot be recovered under a continuing nuisance theory.¹⁶⁶ Yet, the rule that permanent damages cannot be recovered under a continuing nuisance claim is not uniform, as several courts have held that recovery of such damages are possible.¹⁶⁷ For courts to end up on the opposite side on such an important issue indicates that plaintiffs and defendants could be playing a dangerous game if they elect to seek permanent damages in a continuing nuisance or trespass case. More importantly, such differing interpretations under the same basic fact scenario show the need for a uniform and consistent statutory scheme governing environmental nuisance and trespass claims.

IV. ESTABLISHING UNIFORM STANDARDS WOULD DO LITTLE TO DISRUPT THE SUBSTANTIVE RIGHTS OF PLAINTIFFS

Recent case law recognizes that common law nuisance and trespass claims in environmental matters are secondary claims when such claims are combined with other statutory

165. By the time of this publication, the Supreme Court will have probably ruled in the *Mangini* case, which they agreed to hear on Oct. 27, 1994. *Mangini v. Aerojet-General Corp.*, 883 P.2d 387 (Cal. 1994).

166. *Mangini II*, 31 Cal. Rptr. 2d at 707-08; see also *Adams v. Star Enter.*, 851 F. Supp. 770, 773 (E.D. Va. 1994); *Spaulding v. Cameron*, 239 P.2d 625, 629 (Cal. 1952); *Spar v. Pacific Bell*, 1 Cal. Rptr. 2d 480, 483-84 (Ct. App. 1991); *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827, 839-40 (Ct. App. 1991), rev. granted, 883 P.2d 387 (Cal. 1994); *Ploney v. Reser*, 3 Cal. Rptr. 551 (App. Dep't Super. Ct. 1960); *Stevinson v. Deffenbaugh Indus.*, 870 S.W.2d 851, 855-56 (Mo. Ct. App. 1993); *Graveley Ranch v. Scherping*, 782 P.2d 371, 375 (Mont. 1989).

167. *Beatty v. Washington Metro. Area Transit Auth.*, 860 F.2d 1117, 1125-26 (D.C. Cir. 1988); see also *Signal Mountain Portland Cement Co. v. Brown*, 141 F.2d 471, 474 (6th Cir. 1944); *Hartzler v. Town of Kalona*, 218 N.W.2d 608, 610 (Iowa 1974).

claims.¹⁶⁸ For example, in the case of *Chevron U.S.A., Inc. v. Superior Court*,¹⁶⁹ the court considered "whether a property owner who might otherwise be entitled to indemnification for abating a 'continuing nuisance' is barred by the statute of limitations applicable to latent defects."¹⁷⁰ The court acknowledged that generally a continuing nuisance claim "may be brought at any time before the nuisance or trespass has been discontinued or abated or within three years afterward."¹⁷¹ In establishing that the statute of limitations for construction defects applied, the court reasoned:

The continuing nuisance or trespass theory allows for deferral of the starting date of the statute of limitations in much the same way as does the discovery rule. Neither theory or rule may override the statute of repose created by the Legislature's fixed starting point and outer limit for latent construction defects. We apply the same two-step process used in other real property construction defect cases.¹⁷²

Moreover, in the case of *City of San Diego v. U.S. Gypsum*,¹⁷³ the court reviewed whether products liability statutes of limitations take precedence over continuing nuisance statutes of limitations. In holding that products liability statutes of limitations are supreme to such common limitations periods, the court reasoned "[The] [c]ity cites no California decision, however, that allows recovery for a defective product under a nuisance cause of action. Indeed, under City's theory, nuisance 'would become a monster that would devour in one gulp the entire law of tort'"¹⁷⁴

Both *Chevron* and *U.S. Gypsum* stand for the proposition that if a statutory statute of limitations conflicts with a common law statute of limitations, the statutory period is adopted. However, courts have extended this rule to apply to substantive laws as well.

168. *Chevron U.S.A., Inc. v. Superior Court*, 36 Cal. Rptr. 2d 783, 787-88 (Ct. App. 1994); *City of San Diego v. U.S. Gypsum Co.*, 35 Cal. Rptr. 2d 876, 880-82 (Ct. App. 1994).

169. *Chevron U.S.A., Inc.*, 36 Cal. Rptr. 2d at 783.

170. *Id.* at 784.

171. *Id.*

172. *Id.* at 788.

173. 35 Cal. Rptr. 2d 876, 880-81 (Ct. App. 1994).

174. *Id.* at 883, (quoting *Tioga Pub. Sch. Dist. v. U.S. Gypsum*, 984 F.2d 915, 921 (8th Cir. 1993)).

In *Feikema v. Texaco, Inc.*,¹⁷⁵ the Fourth Circuit held that if state environmental nuisance and trespass claims conflict with a consent order issued under the Resource Conservation and Recovery Act, then such state claims are barred.¹⁷⁶ Thus, courts recognize that environmental nuisance and trespass cases should be pursued under a uniform statutory scheme that outlines when a cause of action exists and sets a uniform statute of limitations. Courts also understand the injustice created by the Legislature's unwillingness to mandate the classification of all environmental nuisance and trespass claims. As the court acknowledged in *Chevron*, when discussing the fact that the plaintiff, not the defendant, was stuck with the cleanup costs:

DiSalvo's assertions of unfairness and violation of public policy favoring accountability for pollution warrant consideration, however. They point to inequities in the statute of limitations and to potential unfairness in its application. The result in *Grange* demonstrates the same unfairness DiSalvo finds here. The party who may have caused the contamination was exempted by the statute of limitations, while a more innocent possessor of the property at the time of the contamination (San Rafael in *Grange*, DiSalvo here) might be held accountable for clean-up costs.¹⁷⁷

In short, courts appear to be pleading with the legislatures to enact laws that eliminate nuisance and trespass inconsistencies, so as to allow both plaintiffs and defendants the ability to be adequately informed about how to pursue claims that today are deemed environmental nuisances and trespasses. Until such laws are passed, injustice will continue to plague all parties involved.

V. CONCLUSION

Allowing plaintiffs to use common law nuisance and trespass theories in environmental cases was logical prior to 1970 because there were few environmental statutes in place that provided the necessary remedies for plaintiffs. As a matter of fact, a legitimate argument can be made on behalf of legisla-

175. 16 F.3d 1408 (4th Cir. 1994).

176. *Feikema*, 16 F.3d at 1416.

177. *Chevron U.S.A., Inc. v. Superior Court*, 36 Cal. Rptr. 2d 783, 789 (Ct. App. 1994).

tures that there was little reason to require plaintiffs to file under environmental statutes prior to the mid 1980's because no one recognized the extent of the environmental problems in this country.¹⁷⁸ However, modern technology, used to assess and detect environmental problems, is far more sophisticated today than it was in 1970, or for that matter 1985.

We now know that environmental problems are much more pervasive, and that clean-up operations are more complicated than anyone ever suspected. To address these complications, most environmental statutes passed in the 1970's and 1980's have been significantly modified.¹⁷⁹ In essence, these statutes have sought to keep pace with the technological advances that have occurred over that period. The use of common law nuisance and trespass claims to address environmental problems is an outdated method since much of the caselaw relied upon precedes the enactment of many of the environmental statutes. Consequently, the cases do not direct the courts on how to confront the complicated problems that are associated with pollution.

Until the legislative branch requires that environmental nuisance and trespass claims be brought under one of the environmental statutes, the gap between technological advances and common law interpretation of what is considered a continuing nuisance and trespass will continue to widen. More importantly, the confusion created by the courts inter-

178. A perfect example of how the legislative branch did not recognize the extent of the hazardous waste problem is Congress' initial passage of CERCLA. Initially, CERCLA was only authorized for five years. See H.R. REP. NO. 1016, 96th Cong., 2nd Sess. pt. 2, at 11 (1980). Another example is the Clean Water Act, where Congress thought that the nation's rivers would be cleaned up by 1985. See G. Nelson Smith, III, *Lawmaker As Lawbreaker: Enforcement Actions Against Municipalities For Failing To Comply With The Clean Water Act*, 41 CLEV. ST. L. REV. 685 (1993).

179. CERCLA, initially passed in 1980, was reauthorized as the Superfund Amendment of 1986. See H.R. REP. NO. 253(III), 99th Cong., 1st Sess., at 19 (codified as amended to 18 U.S.C. §§ 9601-9675 (1994)). RCRA, initially passed in 1976, was reauthorized in 1984 with the Hazardous and Solid Waste Amendments. See H.R. REP. NO. 14, 496, 94th Cong., 2nd Sess., at 1 (1984). The Federal Water Pollution Control Act of 1972 was amended as the Clean Water Act of 1977 and the Water Quality Act of 1987. See Federal Water Pollution Control Act, S. REP. NO. 1, 93rd Cong., 1st Sess., at 1 (1973); Clean Water Act, S. REP. NO. 95-370, 95th Cong., 1st Sess., at 1 (1977); Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 36 (codified in scattered sections as amended 33 U.S.C. §§ 1251-1387). The Clean Air Act of 1970 was amended in 1977 and virtually overhauled and rewritten in 1990. See Clean Air Act, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

preting the meaning of nuisance and trespass in environmental cases will continue to plague both plaintiffs and defendants in such cases.

